

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT DONALD WESNER, JR.,

Defendant-Appellant.

UNPUBLISHED

October 19, 2006

No. 261848

Calhoun Circuit Court

LC No. 2004-003368-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right following jury trial convictions for using a financial transaction device without consent, MCL 750.157n(1), first-degree home invasion, MCL 750.110a(2), two counts of possession of a firearm during the commission of a felony, MCL 750.227b, possession of a firearm by a felon, MCL 750.224f, and larceny by stealing a firearm, MCL 750.357b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 21 to 72 months' imprisonment for use of the financial transaction device without consent; 200 to 260 months' imprisonment for first-degree home invasion; two years each for his felony-firearm convictions; and 47 to 90 months' imprisonment each for firearms larceny and possession of a firearm by a felon. We affirm.

Defendant's sole issue on appeal is that the trial court erred by scoring offense variable (OV) 7, MCL 777.37, and OV 8, MCL 777.38 at fifty and fifteen points respectively. A sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record which adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions will be upheld if there is any evidence to support it. *Id.* A trial court's scoring determination is reviewed for an abuse of discretion. *Id.* "A defendant is entitled to have the sentencing guideline's range correctly calculated so that a trial court may determine an appropriate sentence in light of that range." *People v Hannan (After Remand)*, 200 Mich App 123, 127; 504 NW2d 189 (1993).

OV 7 relates to aggravated physical abuse and is scored at fifty points when the victim "was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism is defined by the statute as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). If there was no such treatment, the variable is scored at zero. MCL 777.37(1)(b).

In this case, the record supports both that defendant's conduct subjected the victim to humiliation, which was inflicted to produce suffering or for the offender's gratification, and conduct that was designed to substantially increase the fear and anxiety the victim suffered during the offense. After the three offenders, two of whom wore nylon masks, ransacked and took various items from the victim's home, they threw coffee on him and smashed light bulbs on the tile floor around him as he lay on the floor with his hands tied behind his back. The offenders laughed and snickered while engaging in these activities. This conduct could have no other purpose than to humiliate the victim, and the offenders displayed evidence of their apparent amusement while doing so.

Further, the record supports that defendant's conduct was designed to substantially increase the victim's fear and anxiety. They pointed an object at the victim, which looked like a gun, threatened to shoot the victim, asked him if he wanted to die, used profanity at him, and ransacked his home while his hands were tied. The trial court did not abuse its discretion in scoring OV 7 at fifty points under the facts of this case.

Defendant also challenges the scoring of OV 8 at fifteen points. However, any error in the scoring of that variable is harmless because the recommended guideline's range would not change even if OV 8 were scored at zero. *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993).

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto